Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

No. 80-704

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

WILLIAM M. GIBBONS, Trustee of the Chicago, Rock Island & Pacific Railroad Company; the FIRST NATIONAL BANK OF CHICAGO, as Indenture Trustee; CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, as Indenture Trustee; and HENRY CROWN, *et al.*,
Petitioners,

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION; the UNITED STATES OF AMERICA; the INTERSTATE COMMERCE COMMISSION; and NEIL GOLDSCHMIDT, United States Secretary of Transportation, *Respondents.*

On Petition For A Writ Of Certiorari To The United States Court of Appeals For the Seventh Circuit

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BRIEF FOR RESPONDENT RAILWAY LABOR EXECUTIVES' ASSOCIATION IN OPPOSITION

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December 17, 1980

QUESTION PRESENTED

In the opinion of respondent Railway Labor Executives' Association, the question framed by petitioners does not accurately state the issue raised by their petition; in respondent's opinion, the following question is presented:

> Should this Court accept for review prior to judgment by the United States Court of Appeals for the Seventh Circuit (which judgment must be rendered by December 28, 1980), an order enjoining, preliminarily, enforcement of the employee protective features of the Rock Island Transition and Employee Assistance Act, as amended by the Staggers Rail Act of 1980, and thereby frustrate the clearly expressed intent of Congress that the constitutionality of those statuory provisions be decided by a neutral court as expeditiously as possible?

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On Petition For A Writ Of Certiorari
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For the Seventh Circuit

BRIEF FOR RESPONDENT RAILWAY LABOR EXECUTIVES' ASSOCIATION IN OPPOSITION

Respondent Railway Labor Executives' Association [hereinafter, "RLEA"] respectfully submits that this Court should deny petitioners Gibbons', *et al.*, request for the

issuance of a writ of certiorari to the United States Court of Appeals for the Seventh Circuit in order to review prior to a decision by that Court a preliminary injunction issued on October 16, 1980, enjoining enforcement of the employee protective features of the Rock Island Transition and Employee Assistance Act, as amended by the Staggers Rail Act of 1980 [hereinafter, "RITA" and "SRA," respectively], Pub.L. No. 96-254, amended by Pub.L. No. 96-448, 45 U.S.C. § 1001, *et seq.* Congress has provided through Section 124 of RITA, as amended, that the Seventh Circuit issue its decision by December 28, 1980, in the appeals taken from the injunction issued on October 16, 1980, and a granting of petitioners' request for an interlocutory writ of certiorari would frustrate that intent of Congress.

JURISDICTION

Respondent RLEA disagrees with petitioners' assertion that because of 28 U.S.C. § 1252, this Court has the jurisdiction to review initially the order issued on October 16, 1980. Respondent respectfully submits that whatever jurisdiction this Court may have in this matter is derived from 28 U.S.C. § 1254(1) alone.

COUNTERSTATEMENT OF THE CASE

Rather than reiterate what has been stated before, respondent RLEA adopts as its main statement of the case both its statement at Pages 3 to 8 in the Jurisdictional Statement which it filed on September 15, 1980, in No. 80-415, and the statement of the case set forth at Pages 5 and 6 of the Brief in Opposition to the instant petition for a writ of certiorari which was lodged with this Court by the Trustee of the Chicago, Milwaukee, St. Paul & Pacific Railroad Company [hereinafter, "MILW"]. However, respondent RLEA believes that certain additional facts must be noted. Moreover, certain events have occurred since the

MILW Trustee's brief was lodged which bear upon the efficacy of petitioners' request herein, and those events should also be noted.

Petitioners continually refer to the order of the reorganization court of the Chicago, Rock Island & Pacific Railroad Company [hereinafter, "CRI" or "Rock Island"], dated October 15, 1980 (that is, the order they ask this Court to affirm), as being a denial of motions to vacate the June 9, 1980, preliminary injunction. However, as the very heading of the October 15, 1980, order shows, it is in reality an injunction, preliminarily enjoining enforcement of Sections 106 and 110 of RITA, as amended by the SRA.

Within hours after that injunction was issued on October 16, 1980, respondent RLEA filed a notice of appeal to the Seventh Circuit pursuant to Section 124(a) of RITA, as added by the SRA (docketed as No. 80-2487), and on October 29, 1980, the United States also filed a notice of appeal from that order to the Seventh Circuit pursuant to Section 124(a) (docketed as No. 80-2536).

Respondent RLEA and the federal respondents filed their briefs in their appeals from that injunction by the end of October 1980, and on November 10, 1980, petitioners filed their brief in opposition. RLEA filed a reply brief on November 12, 1980, and on November 13, 1980, the Seventh Circuit sitting *en banc* heard oral arguments on those appeals. The cases have been submitted and are awaiting a ruling by the Seventh Circuit which, according to Section 124(b) of RITA, as added by the SRA, must be rendered by December 28, 1980. Moreover, RLEA filed with the Seventh Circuit a motion to stay that injunction, and that motion is still pending. Consequently, if this Court accepts review of the preliminary injunction prior to that decision, it is inevitable that a decision will not be rendered by this Court for several months on what are now submitted appeals.

REASONS FOR DENYING THE WRIT

1. While This Case Does Present A Matter Of Grave Public Importance, The Public Interest In A Speedy Determination Of The Issue Would Be Frustrated By A Granting Of The Requested Writ At This Time

Petitioners recognize that a writ of certiorari to review a case pending in a federal court of appeals before judgment, while permitted by 28 U.S.C. § 1254(1), will not be granted unless petitioners show "that the case is of such imperative public importance as to justify the deviation from normal appellate practice and to require immediate settlement in this Court." Rule 18, Rules of this Court. According to petitioners, however, this case presents one of those rare instances where the grave public importance of the constitutional issues presented, together with the pending appeal by RLEA in *RLEA* v. *Gibbons*, Sup. Ct. No. 80-415, warrant the immediate issuance of a writ of certiorari to place before this Court the appeals presently awaiting decision before the Seventh Circuit. While respondent RLEA agrees with petitioners that the appeals from the October 15, 1980, preliminary injunction do present matters of grave public importance, respondent nevertheless submits that a pre-judgment writ of certiorari should not be issued in this case, for to do so would frustrate once again the clear intent of Congress that this matter be preliminarily reviewed as quickly as possible.

When Congress passed Section 701 of the SRA amending RITA, it was well aware that it was probable that the Rock Island creditors would once again challenge enforcement of the employee protective features of RITA. Since Congress believed that it was essential to the public interest that the employee protective features of that Act be implemented as soon as possible (*e.g.*, H.Rpt. No. 96-1041, 96th Cong., 2d Sess. at 26(1980)), it expressly provided that "any appeal from . . . any decision of the [CRI reorganization] . . . court with respect to the constitutionality

of any provision of [RITA] . . . shall be taken to the United States Court of Appeals for the Seventh Circuit" (§ 124(a)(1) of RITA, as added by § 701(a)(1) of SRA), and that in cases such as the ones at bar, the Seventh Circuit "shall render a final decision no later than 60 days after the date the last such appeal is filed." Section 124(b) of RITA, as added by Section 701(a)(1) of SRA. Those provisions clearly indicate that Congress intended that an appellate court expeditiously and quickly review an injunction enjoining enforcement of Sections 106 and 110 of RITA, as amended.

At the present time, the appeals from the October 15, 1980, order have been briefed, argued, and submitted, and the Seventh Circuit has taken those appeals under advisement with a clear understanding that a decision must be rendered by December 28, 1980. Consequently, it is apparent that if this Court accepts petitioners' request for the issuance of a pre-judgment writ of certiorari, a neutral court will not pass on the merits of RLEA's and the government's appeals until long after the sixty (60) day time period specified in the Act has passed. Respondent RLEA respectfully submits that such a clear frustration of the will of Congress should not be permitted to occur.

Rule 18 of the Rules of this Court indicates that a prejudgment writ of certiorari should issue only in those cases where the grave public importance of the case requires this Court to determine the question with as much dispatch as possible. *See, R.L. Stern and E. Gressman,* Supreme Court Practice at 304 (5th Ed. 1978). Here, in light of the present posture of the appeals pending before the Seventh Circuit, and in view of the mandatory requirements of Section 124(b) of RITA, the issuance of a prejudgment writ of certiorari in these cases will only serve to delay further a preliminary resolution of the validity of the statutory provisions intended to provide needed benefits to employees—benefits which Congress has twice man-

dated be paid immediately while the validity of the Act is elsewhere determined. *E.g.*, Pet. at j-6, H.Rpt. No. 96-1430, 96th Cong., 2d Sess. at 138 (1980).

2. Petitioners Cannot Rely Upon 28 U.S.C. § 1252 To Support Their Request For The Issuance Of A Pre-judgment Writ Of Certiorari

Petitioners assert that since respondent RLEA has previously taken an appeal to this Court pursuant to 28 U.S.C. § 1252 from the June 9, 1980, preliminary injunction, its appeal from the order of the CRI Reorganization Court dated October 15, 1980, as modified on October 16, 1980, should have also been taken to this Court, and not to the Seventh Circuit. Petitioners then go on to argue that because respondent RLEA has taken its appeal to the wrong court, this Court should rectify that error at this time by issuing a pre-judgment writ of certiorari. Respondent RLEA respectfully submits that petitioners' reliance upon 28 U.S.C. § 1252 to support its request for the issuance of a writ of certiorari is misplaced for several reasons. First, any asserted error in jurisdiction can be, and indeed has been raised by petitioners in the Court of Appeals, and is reviewable by this Court *after* the appeals court has ruled upon that contention. Second, petitioners' argument that 28 U.S.C. § 1252 governs RLEA's appeal from the order of October 15, 1980, is without merit.

Were it not for Section 124(a) of RITA, as added by the SRA, respondent RLEA would have agreed with petitioners and would have taken its appeal from the October 15, 1980, order to this Court. However, Section 124(a) of RITA expressly provides that:

> *Notwithstanding* any other provision of law, any appeal from—
>
> (1) any decision of the bankruptcy court with respect to the constitutionality of any provision of this Act
>
> . . .

> ***shall be taken*** **to the United States Court of Appeals for the Seventh Circuit.**

(Emphasis added.) Respondent RLEA respectfully submits that this specific statutory provision governed RLEA's October appeal, and to the extent that 28 U.S.S. § 1252 is inconsistent, Section 124(a) superseded that statute and was controlling.

RLEA's appeal to this Court from the June 9th injunction was governed by 28 U.S.C. § 1252 which, as petitioners correctly note, provides that "any subsequent appeal or cross appeal [shall be taken] to the Supreme Court." Since the October 15th Order, whether it be considered a new injunction or a reaffirmance of a prior order modified to fit new circumstances, is a subsequent order in a case presently pending before this Court under 28 U.S.C. § 1252, it ordinarily would have been appealable only to this Court. Petitioners hinge their argument in support of their request for a pre-judgment writ upon that subsequent appeal provision, and assert that Section 124(a) is inapplicable for two reasons. First, according to petitioners, Section 124(a) must be construed as being prospective in application,[1] and second, that provision cannot be construed as depriving this Court of jurisdiction over a pending case and still be constitutional.[2] Petitioners' arguments, however, are without merit, for what petitioners gloss over is the fact that the order dated October 15, 1980, is appealable in its own right, and the jurisdiction of any court to hear that appeal

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[1] That argument is contrary to the rules of statutory construction for the general rule is that statutes affecting jurisdiction apply to pending suits, and jurisdiction will not survive unless expressly reserved. *De La Rama S.S. Co. v. United States*, 344 U.S. 386, 390 (1953).

[2] That argument questions the continued validity of *Ex Parte McCardle*, 74 U.S. (7 Wall.) 506 (1868), but ignores the fact that Section 124(a) does not deprive this Court of jurisdiction to review this case, or the earlier appeal by way of a writ of certiorari. *See, Ex Parte Yerger*, 75 U.S. (8 Wall.) 85 (1868).

could not have vested until after the order was issued and RLEA noted its appeal, two days after the SRA, with its amendments to RITA, was enacted. Jurisdiction, RLEA respectfully submits, does not exist in a vacuum.

Section 124(a) of RITA, a specific statute, expressly provided at the time the October 15th order was issued that, "*Notwithstanding* any other provision of law," any appeal from that order should be brought to the Seventh Circuit. By the unequivocal terms of that statute, it superseded the subsequent appeal provision of Section 1252, and under normal rules of statutory construction would control over a more general statute such as Section 1252. *E.g., Posadas* v. *National City Bank,* 296 U.S. 497, 503-04 (1936); *see also, Radzanower* v. *Touche Ross & Co.,* 426 U.S. 148 (1976).

While respondent RLEA recognizes that implied repeals are not favored, *Regional Rail Reorganization Act Cases,* 419 U.S. 102, 133-34 (1974), they have occurred. Moreover, it must also be recognized that rules of statutory construction are simply yardsticks by which to measure congressional intent. In this case, the Conference Report of the SRA, H. Rpt. No. 96-1430, *supra,* at 137-38 (1980), clearly indicates that Congress intended Section 124(a) to require constitutional challenges such as the ones arising from RLEA's and the Government's appeals from the October 15th order, to be heard by the Seventh Circuit. However, it is impossible to give effect to both Sections 1252 and 124(a) in this matter; one statute has to govern because only one court can hear this matter initially. Since the subsequent appeal provisions of Section 1252, and Section 124(a) cannot both coexist as applied to this case, the Congressional intent in enacting Section 124(a), a specific statute, should be controlling. *See, Morton* v. *Mancari,* 417 U.S. 535, 550-51 (1974); *Posadas* v. *National City Bank, supra.* Congress' use of the phrase "Notwithstanding any other provision of law" clearly indicates that Congress intended Section 124(a), and not Section 1252, to be controlling.

Another problem with petitioners' reliance upon 28 U.S.C. § 1252 to avoid the force of Section 124(a) of RITA, is that the enactment of the SRA amendments to Sections 106 and 110 of RITA has rendered moot RLEA's appeal in No. 80-415 from the injunctive order of June 9, 1980. It is well settled that a reviewing court must examine an injunction in light of the law as it stands when that injunction is reviewed; not as it stood when the injunction was issued. *Diffenderfer* v. *Central Baptist Church*, 404 U.S. 412, 414 (1972); *Bryan* v. *Austin*, 354 U.S. 933 (1957). Where that amended law materially affects the rationale for the issuance of the injunction in the first place, it can nullify the justiciability of an appeal. *E.g., Hall* v. *Beals*, 396 U.S. 45, 48 (1969). Stated differently, where the subsequent law is itself the new source of the dispute between the parties, a decision on the prior law will not affect the rights of the parties, and thus, an appeal from an injunction under the prior law is moot. *E.g., United States* v. *Alaska S.S. Co.*, 253 U.S. 113, 115-17 (1920).

This is precisely the situation in the matter before this Court in No. 80-415 (RLEA's appeal from the June 9th injunction), for the order dated October 15, 1980, is the reason why Sections 106 and 110 of RITA, as amended, are not being enforced; not the June 9th order. The statutory provisions which are the subject of the June 9, 1980 injunction have been repealed and replaced by new provisions which materially modify the prior requirements upon which the earlier injunction was premised. Consequently, that appeal is moot, and cannot be used by petitioners as a bootstrap to deprive the Seventh Circuit of jurisdiction by virtue of an improvident application of 28 U.S.C. § 1252. *Cf., United Mine Workers* v. *Gibbs*, 383 U.S. 715, 726 (1966).

CONCLUSION

For the reasons set forth herein, and for those reasons set forth in the brief of the Milwaukee Railroad Trustee which was lodged with this Court on or about November 7, 1980, respondent RLEA submits that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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